



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 6, 2005

Ms. Ellen B. Hutchital
McGinnis, Lochridge & Kilgore, L.L.P.
1221 McKinney Street, Suite 3200
Houston, Texas 77010

OR2005-04930

Dear Ms. Hutchital:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 228388.

The Eanes Independent School District (the "district"), which you represent, received a request for the district's check register for the past two years. You claim that some information appearing in the responsive documents is excepted from disclosure under section 552.136 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." You have marked the district's bank account number in the submitted sample documents. We agree that the account number is excepted under section 552.136 of the Government Code

¹ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

and must be withheld. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Saldivar', with a long horizontal flourish extending to the right.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 228388

Enc: Submitted documents

c: Ms. Dianna Pharr
2204 Westlake Drive
Austin, Texas 78746
(w/o enclosures)



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 6, 2005

Mr. Wayne Thorburn
Commissioner
Texas Appraiser Licensing and Certification Board
P.O. Box 12188
Austin, Texas 78711

OR2005-04931

Dear Mr. Thorburn:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 225466.

The Texas Appraiser Licensing and Certification Board (the "board") received a request for information regarding threatened legal action and allegations of slander and misrepresentation against the requestor. You inform us that you have released a portion of the requested information but claim that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. The Federal Financial Modernization Act, also known as the Gramm-Leach-Bliley Act (the "GLB Act"), became law in November 1999. *See* 15 U.S.C. § 6801 *et seq.* The purpose of the GLB Act was to promote competition in the financial services industry. *See* H.R. Conf. Rep. No. 106-434, at 245 (1999), *reprinted in* 1999 U.S.C.C.A.N. 245, 245. Reflecting Congressional concern regarding the dissemination of consumer's personal financial information, the Act provides certain privacy protections "to protect the security and confidentiality of [consumers'] nonpublic personal information." 15 U.S.C. §6801. The statute defines nonpublic personal

information (“NPI”) as “personally identifiable financial information [“PIFI”] - (i) provided by a consumer to a financial institution; (ii) resulting from any transaction with the consumer or any service performed for the consumer; or (iii) otherwise obtained by the financial institution.” 15 U.S.C. § 6809(4)(A). Federal Regulations define “PIFI” as “any information: (i) [a] consumer provides to [a regulated financial institution] to obtain a financial product or service . . . (iii) [a]bout a consumer resulting from any transaction involving a financial product or service between [a regulated financial institution] and a consumer; or (iii) [a regulated financial institution] otherwise obtain[s] about a consumer in connection with providing a financial product or service to that consumer.” 16 C.F.R. § 313(o)(1).

Additional protection is provided to consumers by limitations placed on the reuse of PIFI obtained from a financial institution by a nonaffiliated third party. Section 6802(c) provides as follows:

. . . a nonaffiliated third party that receives from a financial institution [NPI] under this section shall not, directly or through an affiliate of such receiving third party, disclose such information to any other person that is a nonaffiliated third party of both the financial institution and such receiving third party, unless such disclosure would be lawful if made directly to such other person by the financial institution.

15 U.S.C. § 6802(c). You state that a portion of the submitted information is “consumers’ personal information obtained by financial institutions[.]” However, you do not inform this office, nor does the information on its face reflect, that the information at issue is NPI or PIFI as defined by the federal regulations. *See Individual Reference Services Group, Inc. v. Federal Trade Commission*, 145 F. Supp.2d 6, 17 (D.D.C. 2001) (“It is the context in which information is disclosed—rather than the intrinsic nature of the information itself—that determines whether information falls within the GLB Act.”). Thus, we are unable to conclude that the GLB Act is applicable to this information.

We note that the submitted documents contain personal financial information of named individuals. Section 552.101 also encompasses the doctrine of common law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is generally protected by common law privacy. *See Open Records Decision Nos. 600* (1992) (public employee’s withholding allowance certificate, designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and employee’s decisions regarding voluntary benefits programs, among others, are protected under common law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills,

and credit history protected under common law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common law privacy). We have reviewed the submitted records and marked the information which constitutes personal financial information that must be withheld under section 552.101 in conjunction with common law privacy.

Finally, we will address your claim regarding the memo dated June 17, 2003. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). Having considered your arguments and representations and having reviewed the memo at

issue, we find that this memo is a privileged attorney-client communication that the board may withhold under section 552.107.¹

In summary, the board must withhold the information we have marked under section 552.101 in conjunction with common law privacy. The board may withhold the memo dated June 17, 2003 under section 552.107. The remainder of the submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

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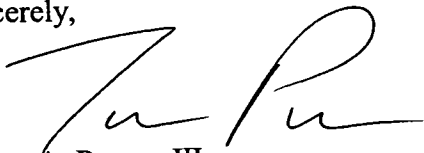
Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

¹ As our ruling is dispositive, we need not address your section 552.111 claim.

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Person III', written over a horizontal line.

James A. Person III
Assistant Attorney General
Open Records Division

JP/seg

Ref: ID# 225466

Enc. Submitted documents

c: Mr. Harold Barker
9191 Garland Road #1126
Dallas, Texas 75218
(w/o enclosures)